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Supreme Court, U.S.
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No. 87-1284/2038; 87-1286/2072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and

ROGER TOWNE (Petitioners)

-vs-

UNITED STATES OF AMERICA (Respondent)

APPENDIX

VOLUME VIII

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The government maintains that Fitzsimmons need not have performed any predicate acts to be a participant in the conspiracy. See **United States** v **Tripp**, 782 F2d 38, 41 (6th Cir) (a RICO conspiracy does not require proof of any overt act or proof that any predicate act of racketeering was actually committed), cert. denied, 475 US 1128 (1986). Furthermore, the government asserts that even time-barred predicate acts, although insufficient to state offenses in themselves, can serve as the basis for finding that the defendant agreed to participate in a conspiracy. See **United States** v **Persico**, 832 F2d 705 (2d Cir 1987) (conspiracy convictions upheld even though the predicate acts of these defendants occurred more than five years prior to the date of the indictment), cert. denied, **Russo** v **United States**, 486 US 1022 (1988). The differing positions are due in part to differing characterizations of the effect of Fed. R. Crim. P. 34. Defendant

characterizes the ruling below as deeming the predicate acts non-offenses. Since the instruction permitted the jury to find a conspiracy if it found agreement to perform these "non-offenses," the conspiracy conviction, according to defendant must fail. The government offers a narrower characterization. Although the predicate acts are technically not offenses because they were time-barred (or more appropriately invalidly pleaded continuing offenses in an attempt to defeat the time-bar), they nonetheless are sufficient to demonstrate that defendant had agreed to participate in the joint objectives of the conspiracy by agreeing to perform two predicate acts. To the extent the jury relied on the actual acts alleged in those non-offenses, it relied on acts which were sufficient to demonstrate defendant's participation within the conspiracy. We agree with the latter characterization. Even though non-offenses, the acts alleged were sufficient to

demonstrate that Fitzsimmons agreed to commit two racketeering acts. By agreeing to commit those acts, Fitzsimmons entered into the conspiracy. The conspiracy, composed of multiple participants and having broad objectives beyond these particular acts, continued past December 21, 1979 and into the limitations period. Fitzsimmons did not withdraw from the conspiracy before such time, and can, therefore, be held accountable for its actions. Similarly, because Towne's alleged act in Count 3, even though a non-offense, could serve as a basis for finding he participated in the conspiracy, his conviction on Count 2 is also valid.

The jury instruction should not be interpreted as simply bootstrapping a conspiracy conviction onto a finding of the requisite elements of a substantive conviction. The jury is asked to determine whether the defendant "agreed to commit two racketeering acts." Assuming that the jury found that defendants agreed to commit these

acts, as Fitzsimmons and Towne ask us to do, it is the agreement to commit these acts, not the acts themselves, that is the basis of the conspiracy conviction.

G. Prosecutor's Rebuttal Comments

In his rebuttal, prosecutor Newcomer referred to the stricken coconspirator hearsay testimony provided by witness Judy Burke. Burke testified that she had overheard a conversation between Brown and Frank Fitzsimmons, Sr. (defendant Fitzsimmons' father) in which Fitzsimmons thanked Brown for "taking care of my son and his family in their time of need." Defendant Fitzsimmons claims that this statement, later stricken, constituted the only direct evidence that he personally (not including his wife) received anything of value after he left the Fund; all other evidence was circumstantial.

While attempting to demonstrate that Fitzsimmons received money after leaving office, prosecutor Newcomer stated that

"there's testimony that there were monthly contact between Mrs. Fitzsimmons and Mr. Brown for business purposes." Contrary to Newcomer's assertion, however, there was no testimony of monthly contacts between Brown and Fitzsimmons other than that contained in Burke's stricken testimony. Fitzsimmons' counsel objected to the rebuttal statements and moved for a mistrial. The court gave a curative charge instructing the jury to disregard testimony concerning Brown's visits to Mrs. Fitzsimmons and the reference made to it in rebuttal. The comment is not so prejudicial that a new trial is required; we can presume that a jury will follow the instruction to disregard the inadmissible evidence presented to it as well as the reference in rebuttal. See **Greer** v **Miller**, 483 US 756, 766 n.8 (1987).

Fitzsimmons also objects to Newcomer's comment that Fitzsimmons was an "ex -con." Newcomer was asking the jury to find that Fitzsimmons solicited the money he

and his wife received in 1980 and 1981 before he ever left the Fund in January 1980. The tacit agreement to accept money could have come even before he left the Fund, Newcomer argued, because Brown and Towne were aware that Fitzsimmons would be an influential union contact even after he was released from jail. In that context, Newcomer stated, "[b]y this time he's an ex-con who . . . may have union contacts, but severely damaged union contracts, unless that's a badge of courage within the Teamster's union which I can't believe."

Fitzsimmons charges that the reference was inflammatory and, along with the other indirect reference to Burke's testimony about Frank Fitzsimmons, Sr., was an attempt to portray this case as a "Teamsters case " The government responds that, although calling Fitzsimmons an ex-con might have been indelicate, it was neither false nor misleading. Presumably, it had been disclosed earlier in the trial that

Fitzsimmons had previously been convicted of a felony, and his conviction was the reason he had resigned as trustee of the Fund. Again, taking the comment in its context, it does not rise to the level of reversible error. The rebuttal itself lasted for approximately fifty pages of transcript. The isolated reference does not suggest that the jurors should convict Fitzsimmons because he had previously committed a felony, it only suggests that he had union contacts or influence, albeit damaged contacts, even as an ex-offender.

III.

For the foregoing reasons, we **reverse** the conviction of defendant Schwartz and confirm the convictions of defendants Collins, Fitzsimmons and Towne.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	
v	Court of Appeals
CHARLES COLLINS (87-1283),	Nos. 87-1283/84/85/86
FRANCIS R. FITZSIMMONS (87-1284/2038),	87-2038/2072
SOL SCHWARTZ (87-1285) and	Lower Court
ROGER TOWNE (87-1286/2072),	No. 84-20715
Appellants.	

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PETITION FOR REHEARING, REHEARING EN BANC AND JOINDER IN PETITION FOR REHEARING AND REHEARING EN BANC FILED BY APPELLANTS FITZSIMMONS AND COLLINS

NOW COMES Appellant ROGER TOWNE, by his counsel, RICHARD PAUL ZIPSER, and petitions this Honorable Court for Rehearing and Rehearing En Banc and in compliance with and the Federal Rules of Appellate Procedure and the Rules of the Sixth Circuit of the United States Court of Appeals further states that:

A. I express a belief based on a reasoned and studied professional judgment that the Panel decision is contrary to the following decisions of the United States Court of Appeals for the Sixth Circuit or the United States Supreme Court and that the consideration by the full court is necessary to secure and maintain uniformity of decisions:

Steele v **Taylor**, 684 F2d 1193 (6th Cir 1982)

United States v **Popenas**, 780 F2d 545 (6th Cir 1985)

Brady v **Maryland**, 373 US 83 (1963)

United States v **Agurs**, 427 US 97 (1976)

United States v **Bagley**, 473 US 667 (1985)

B. RICHARD PAUL ZIPSER, counsel to Appellant, also expresses a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. a. Where the Government prosecutor engages in making, as this Panel has found, several false representations to the Trial Court; and

b. where such Government action was part of a deliberate ruse and continued subterfuge that resulted in a wrongfully obtained Ex Parte Protective

Order denying to the Appellant Towne the knowledge and content of a Government-made tape recording of the words of Co-Defendant Fitzsimmons to the Government's Agent-Informant that contained material evidence, exculpatory in nature and aided greatly in adequate preparation of Appellant Towne's strategy and central to Towne's bona fide defense; and

c. where additional considerations:

(1) that the Government had created the unavailability of this evidence; (2) opposing severance thereby further making Fitzsimmons' testimony unavailable while knowing of the existence and content of the tape recording; and (3) Government counsel admitted that the Government wanted the advantage of using the tape recording against Defendants for whatever purpose--does the above require a reversal of Towne's conviction because public policy protects the integrity of the

adversary process, deterring litigants (including the Government) from acting on improper incentives to knowingly make unavailable adverse testimony or evidence, on principles of reciprocity similar to the equitable doctrine of clean hands; and because the Government counsel misused the Trial Court and made false representations to the Trial Court to gain an improper Order effectively depriving use by Appellant Towne of important evidence.

2. Does the failure to produce the tape recording and the false manner and method of the Government in failing to produce the evidence (the tape of co-Defendant Fitzsimmons) require a reversal of Appellant Towne's conviction, where the jury had acquitted Towne of the RICO substantive offense but convicted him of a conspiracy to commit a RICO substantive offense; and does the analysis of the circumstances, including the jury being troubled, the actions of the Government, and

the failure to produce the evidence violate the Due Process clause and the decisions in Brady, Bagley, Agurs, and the tests enunciated by said case authority require reversal of Appellant Towne's conviction?

C. Counsel adopts the Statement and Petition filed by the Co-Defendants Fitzsimmons and Collins for Rehearing and Rehearing En Banc.

_____ _____

Date

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THE PETITION CONSIDERATIONS

This Court is asked to rehear, or to grant rehearing en banc, for the following additional reasons:

1. The failure to reverse the conviction of Towne rewards the Government for engaging in a ruse and lengthy subterfuge to avoid the providing of material evidence to the Appellant Towne. The Government sought a Protective Order from the Trial Court, where it is clear that such an Order was not appropriate and, moreover, was obtained by repeated false representations of the Government to the Trial Court. The Protective Order (effectively hiding the evidence from Appellant Towne) had been obtained from the Trial Court exclusively through the Government's offer of proof, which was later discovered to have contained false statements. (See page 16 of current Sixth Circuit Opinion filed February 26, 1991, hereinafter referred to as "Opinion.")

2. The Trial Court ruled in a st-trial opinion that, in fact, the vernment's offer of proof contained several lse statements. (See Opinion, page 16.) pellant Towne has argued that the failure disclose this recorded conversation and to ve the evidence and knowledge with the pellant prior to trial, or during trial, verely damages the Appellant Towne and did disservice to the inherent fairness within e conduct of the trial itself. Towne intains that as a result of the conduct of e Government in its suppression of culpatory evidence consistent with his nocence warrants reversal of his nviction.

3. The action of the Government the equivalent of activity frowned upon by e Sixth Circuit in **Steele** v **Taylor**, 684 F2d 93 (6th Cir 1982). There, the Sixth rcuit held that a prior statement, given by witness who is unavailable due to the ongful conduct of a party, is admissible

against the party if the statement would have been admissible had the witness testified. The rule is based on public policy protecting the integrity of the adversary process by deterring litigants from acting on strong incentives to knowingly make unavailable adverse testimony on a principle of reciprocity similar to the equitable doctrine of clean hands. This principle applies to the Government, as well as all other parties to litigation.

4. Further, in **Steele** v **Taylor**, the Court recounted that witnesses or individuals do not make statements which are damaging to themselves unless satisfied that they are true. 684 F2d 1204. The Court then permitted the unavailable declarant's statement to an Agent to be testified to by the Agent, as it fell within admissible evidence bases; and, importantly, because the party had made the declarant unavailable by the actions it had taken.

5. In the instant matter, the vernment made the secret tape recording of -Defendant Fitzsimmons unavailable ntaining important material-exculpatory idence as to Towne and inculpatory at times Fitzsimmons. It used a ruse to achieve e result by making multiple false atements to the Trial Court. As the matter w stands, the Government is being rewarded r having ostensibly hidden the evidence. pellant Towne is entitled to a reversal of s conviction.

6. The Government constructed the tigation. It proceeded by a joint dictment of the Defendant Towne with fendants Fitzsimmons, Schwartz, Collins and rter. It fought every Motion for Severance de by the Defendant Towne. Co-Defendant tzsimmons could not be brought to the stand a witness. He was a Co-Defendant with a ght to remain silent, and he asserted that ght. An unavailable declarant, tzsimmons went further and utilized his

marital relationship with Mrs. Fitzsimmons to provide a privileged circumstance where Mrs. Fitzsimmons could not be cross-examined or called by Appellant. Yet, during the entire time, the Government was secretly in possession of a transcript of statements made by Fitzsimmons to the Government's Agent and Informant that essentially contains the defense of Towne to the charge laid against him.

7. As the Panel or this Circuit rehears this issue, the gravamen of the only count of the Indictment Appellant Towne stands convicted essentially is that the Government had to prove the intent of Appellant Towne in giving the Fitzsimmonses something of value by providing Mrs. Fitzsimmons, the Appellant's wife, with money or things of value with a criminal purpose and intent, contrary to 18 USC 1954 [that said money was given because of the actions, decisions, and duties of Francis Fitzsimmons related to his ERISA function as a Trustee of

Michigan Conference of Teamsters Welfare
l, hereinafter referred to as "The Fund"].

8. The knowledge of the tape's
stence and its content would have aided
ne in the preparation of his case (i.e.,
e the stand, severance actions,
oenaing witnesses). Towne could have put
the central theme of the argument and
rt of his defense; namely, that his
ions were consistent with a bona fide
ose unrelated in time or in action to the
SA relationship of Fitzsimmons.

9. Focusing on reasonableness and
ability, the Government's actions
cluding the use of the hidden tape as
dence and preparation, including conduct
strategy at trial would under **Brady** v
yland test, 373 US 83 (1963) and **United**
tes v **Bagley** standard, 473 US 667, 682
5), compel this Honorable Court to find
had disclosure been made, it would fall
ain a reasonable probability of affecting
outcome of the trial as to Towne.

10. This Honorable Court is asked to read or reread pages 25-27 of the transcript of the tape recording in the instant matter. In doing so, have in mind **Brady** requirements of the disclosure of material.

11. Substantial portions of that taped transcript of May 1, 1985, were exculpatory to the Defendant Towne and inculpatory, in some respects, to the Co-Defendant Fitzsimmons. As to Appellant Towne, they were relevant, material, and probative on the issue of guilt or innocence--in fact, the very central issue--a bona fide purpose of Appellant Towne versus an illegal 1954 wilful violation of the law. Utilizing the **United States** v **Bagley** standard, evidence is considered material where there is reasonable probability that had the evidence been disclosed, the result of the proceedings would have been different.

12. The focal point of the allegations against Towne was the purpose of

giving money to the wife of Co-Defendant Fitzsimmons and that such purpose was related to Fitzsimmons actions as the Trustee of The Fund. Towne's counsel argued that Towne's purposes were consistent with innocence in attracting the Co-Defendant-Appellant Fitzsimmons to work at a later date and were entirely unassociated with his Trustee status of The Fund. A bona fide legal purpose, as opposed to the Government's argued criminal purpose was the defense of Towne.

13. The nondisclosure of the tape involves the consideration of the adverse effect of such action on the preparation or presentation of the Defendant's case including, but not limited to: (a) whether or not Towne would have testified at his trial; (b) whether or not Mrs. Fitzsimmons would have been able to be brought to the stand because the conversation's privilege and confidentiality may have been destroyed as a result of Mr. Fitzsimmons' conversation with the Informant; (c) Whether a severance

would have been granted to allow Towne to be tried apart from Fitzsimmons; and (d) to be able to put Fitzsimmons' taped words before the trier of fact. Further, the Appellant Towne is deprived of a fair trial under the standards set down in **United States** v **Agurs**, 427 US 97 (1976).

14. The Trial Court's post-trial opinion in this matter and the instant Opinion, appear to accept the evidence was admissible. The instant Opinion finds that "although some of these [statements on the tape of Fitzsimmons] could be interpreted as attempts to explain the dealings with Brown and Towne as bona fide, and others as expressions of ignorance about an alleged conspiracy. . ." none could be said to be exculpatory to the extent that there is a reasonable probability the outcome would have been different. (See page 23 of the instant Opinion.) (Brackets added.)

15. Certainly Towne would have offered the portion of the tape recording at

his trial to establish Towne's non-culpability and his bona fide purpose. The Trial Court's Memorandum Opinion is an implied acceptance that the taped conversation was admissible as residual hearsay and, indeed, a finding by the Court that the tape itself may have been useful to the Defendants. (See R 688, Memorandum Opinion, page 25.)

16. A review of the tape transcript establishes Fitzsimmons is commenting on the subject of Towne putting the Co-Defendant Fitzsimmons' wife to work in the job of looking for properties (real estate) and the receipt of some Eleven Thousand Dollars. Fitzsimmons states why the Eleven Thousand Dollars was provided to his wife. Fitzsimmons states he was not even working for the union at that time. Fitzsimmons is not an ERISA employee at the time of the alleged receipt. Fitzsimmons says that it was not accurate that it had something to do with the union. He went to

Roger Towne, who was interested in Fitzsimmons because of his connections with his father. They were worth a substantial amount of money in the future. This is said by Fitzsimmons as having taken place in December of 1981. This is well after Fitzsimmons had resigned as a trustee of The Fund!

17. When the Panel reached its decision concerning notable references to Towne, the Panel had already previously discussed that Fitzsimmons had said on the tape that he and his wife accepted money "but claimed that it was bona fide compensation." (See page 21 of the instant Opinion.)

18. Government's counsel, Newcomer, admitted that he wanted the flexibility to utilize the tape recorded statement in case Fitzsimmons took the stand; or to utilize the tape recorded statement for whatever purposes would be useful for him during the course of the trial. He did not want to preclude the ability of being unable

to use it at some time. (See New Trial Transcript, Volume IV, page 161, 163-164.)

19. The disadvantage to Towne is overwhelming. The statements made by Fitzsimmons on the tape help the Appellant Towne; i.e., (a) exculpatory evidence, (b) material evidence, (c) preparation as to defense, (d) determinations to be made as to whether Towne would take the stand, not take the stand, or the ability to confront or cross-examine other witnesses such as Mrs. Fitzsimmons; and (e) the ability to put Mr. Fitzsimmons words before the jury. The Government had reached its position by a ruse of making false representations to the Trial Court as to why the tape should not be disclosed. Under a **Steel** v **Taylor** doctrine, this is impermissible conduct and conduct that should have led to the admissibility and use of the statements by Towne. See also **United States** v **Puglisi**, 790 F2d 240 (2nd Cir 1986), where the Court condemns the type of structured trial and activity utilized by the

Government to keep out evidence that was relevant and material to Defendant Towne's defense.

20. The Government conceded during the Motion for New Trial in Volume IV, pages 150-151, that the tape recording was mildly inculpatory as to Fitzsimmons. The Government recognized that there was an issue as to a bona fide reason for giving things to Fitzsimmons. Government's counsel anticipated Appellant Towne's defense prior to the return of the Indictment. (See New Trial Transcript, Volume IV, page 155.)

21. This Court is asked to go back and review, or the Court is asked to hear en banc and consider the standards of Due Process enunciated in **Brady** and **Bagley**, **Supra**, and the reflection of the majority viewpoint in Justice Blackman's presentations. Legal scholars have looked at the **Bagley** analysis:

> Certainly if a judge believes that the non-disclosed evidence creates

a reasonable doubt he is likely to conclude that there is a reasonable probability that the outcome would have been different. Yet, where the case obviously troubled the jury, a judge arguably could also find a reasonable probability even though a reasonable doubt is not created in his mind. See **LaFave**, **Criminal Procedures**, Section 19.5 at page 54 (1989).

22. This most Honorable Court of Appeals is asked, again, to recall that the jury was definitely troubled. Towne was acquitted of the substantive RICO offense that contained allegations as predicate acts of giving things of value, contrary to the criminal purpose or the intent contained in 18 USC 1954. Defendant Schwartz was acquitted of the substantive RICO offense. Porter, when he put his bona fide reasons before the jury, was acquitted. Given the troublesome nature to the jury and the

obvious potential of compromised verdict, in the absence of this bona fide purpose in the evidence of the tape, it cannot be said that the evidence was not suggestive of a reasonable probability that the outcome would have been different.

23. In **United States** v **Popenas**, 780 F2d 545 (6th Cir 1985), Judge Martin ruled that the refusal to admit an Affidavit as substantive evidence in a tax evasion case constituted reversible error, even though the Affidavit was hearsay. The Affidavit indicated that falsehoods in taxpayer's returns were due to the affiant's incompetence and therefore was directly relevant to the issue of wilfulness, requiring the Trial Court to center on the viability of FRE 803(24). In **Popenas**, the only question at trial was whether **Popenas** had failed to report substantial amounts of income during the years 1977 to 1980 as a willful act required by the Statute.

24. The analysis in **Popenas** by udge Martin is helpful in looking at the nstant matter:

a. The statement must have ircumstantial guarantees of trustworthiness quivalent to those in the first twenty-three xceptions. Towne qualifies with regard to he sought-after tape recording. Fitzsimmons ives reasons for Towne's bona fide purpose nd Fitzsimmons makes inculpatory remarks as o himself. FRE 804(b)(3).

b. It is being offered as vidence of a material fact. It is more robative on the point for which it is ffered than any other evidence which could e secured through reasonable efforts. In he instant matter, the Government had endered it impossible to produce Mr. or Mrs. itzsimmons (joinder of all Co-Defendants). he Government had, through a ruse, made it mpossible for the Defendant to gain nowledge of the tape's content. The vidence is probative for the point on which

it was being offered; namely, the bona fide intent in the dealings of the Defendant Towne with the Fitzsimmonses.

c. That the admissibility should be consistent within the interests of justice.

d. There was no way anyone could give notice of intent to offer the statement, as the Government had "hidden" the statement from the Defendant.

25. The Appellant Towne has also argued that not only 803(24) was relevant, but its mirror image, FRE 804(b)(3), was also relevant in that the statement made by Fitzsimmons against the interests of Fitzsimmons made it all the more reliable and trustworthy evidence. FRE 804(b)(3) spends a great deal of its time discussing its underpinnings of reliability and trustworthiness.

26. The circumstances of the statement made by Fitzsimmons to the undercover Government Informant in private,

eking help--certainly not knowing he was
ing tape recorded--indicate trustworthiness
rcumstances. Relevant factors determine
e trustworthiness of the statement,
cluding the time of the declaration, the
rty to whom it was made, the existence of
rroborating evidence, the extent to which
e declaration is against the declarant's
nal interest, and the availability of the
clarant as a witness. Co-Defendant
tzsimmons was unavailable as a witness.
e instant Opinion said that Fitzsimmons'
atements tended to be incriminating as to
tzsimmons. (See page 23 of the February 26
inion. This is also fifth point of Martin,
Opinion in **Popenas**, **Supra**.)

27. The Government wanted Schultz
use tape recording. They wanted to have
rd, corroborating evidence of
nversations. Strike Force Attorney Corbet
ated they did not want to rely on Schultz's
rd alone. (See Motion for New Trial
anscript, Volume III, page 63.) The

statement was being made to an individual that had an agency relationship with the Federal Government as a confidential Informant. Schultz had been a confidential Informant since 1951 until January of 1985, and had over 200 contracts during the years 1979-1984, with the FBI. (See Motion for New Trial transcript, Volume I, pages 98-100.) The Government admitted the tape recording and the Motion for New Trial was mildly inculpatory as to Fitzsimmons. (See Motion for New Trial Transcript, Volume IV, pages 150-151.)

28. This Circuit needs to set down with clarity that the Government should not prevail through this ruse of making the evidence unavailable by false representations to the Court about the tape recording that would have assisted in the preparation and presentation--the central bona fide legal rationale for the Defendant Towne's conduct. If this case is anything, the facts set out, the circumstances for **Brady** and **Bagley**,

ora, protection. When a party behaves in a shion as consistent with the behavior tributed to a party hiding a witness in the xth Circuit, the case of **Steele** v **Taylor**, **ora** mandates reversal of Towne's nviction. Towne's conviction should be versed, as there is a rational and asonable probability that, had the evidence en disclosed to the defense, the result of e proceeding would have been different.

29. Additionally, a Sixth Circuit ling is needed with clarity that, when the vernment applies ex parte to a court to oid presenting useful pre-trial evidence to defendant and it turns out that the vernment made substantial false presentations to the court, the injury to e adversary process and the affront to the urt mandates that the conviction be versed to ensure a fair trial and prevent vernment misuse of the Trial Court in nying a fair trial.

This Court should grant rehearing and reverse or grant rehearing en banc; and, upon such hearing, reverse the conviction of Towne for the reasons stated.

Respectfully submitted,

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Dated: March 12, 1991.

NO. 87-1284/2038; 87-1286/2072

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v	)	ORDER
FRANCIS RICHARD FITZSIMMONS	)	
(87-1284/2038),	)	
ROGER TOWNE (87-1286/2072),	)	
Defendants-Appellants)		

BEFORE: JONES and NORRIS, Circuit Judges; and JARVIS*, United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

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*Hon. James H. Jarvis sitting by designation from the Eastern District of Tennessee